UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GILBERTO MENDEZ, on behalf of himself and all others similarly situated,	)
Plaintiff,	)
v.	)
BANK OF AMERICA HOME LOANS SERVICING, LP, a subsidiary of BANK OF AMERICA, N.A.,	)
Defendant.	)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Plaintiff, Gilberto Mendez, submits this memorandum of law in opposition to the Rule 12(b)(6) motion of Defendant BAC Servicing, LP (which was merged into Bank of America, N.A. on July 1, 2011, and is now known as Bank of America N.A., successor by merger to BAC Home Loans Servicing, L.P., and which will be referred to herein as "BAC") to dismiss his Complaint. For the reasons set forth herein, Defendant BAC's motion to dismiss should be denied in its entirety.

I. STATEMENT OF FACTS

This class action has been brought to remedy the unlawful acts and practices of Defendant BAC in connection with its servicing of mortgage loans for a vulnerable class of consumers who are in financial distress and are struggling to keep their homes. BAC has refused to honor valid Countrywide Step Rate Loan Modification agreements with Plaintiff and other similarly situated homeowners and has placed Plaintiff and other homeowners in an endless loan modification application cycle during which BAC routinely misplaces or otherwise fails to maintain and timely consider the applicant's income documents. Complaint ¶¶ 3, 4. At the same time that Plaintiff and other homeowners are caught in the never ending loan modification application cycle, they are pushed further into debt by BAC, which charges them late and penalty fees, interest, and default service fees, including monthly inspection fees in amounts which exceed the law. *Id.* ¶¶ 4, 14, 24, 25. Defendant BAC's practice is to string homeowners along, with no intention of honoring a loan modification, and to make money in the process by charging the homeowners excessive and otherwise unlawful default related fees. *Id.*

In March 2011, Mr. Mendez filed his Complaint against Defendant BAC on behalf of himself and a class of similarly situated persons who: (a) accepted a Step Rate home loan modification offer with Countrywide Home Loans Servicing LP ("Countrywide") which was not honored by BAC following the acquisition of Countrywide by Bank of America, N.A. in July 2008, and/or (b) were charged excessive and unlawful default service fees by BAC on their monthly mortgage statements, including, but not limited to, inspection fees. Mr. Mendez has alleged claims for breach of contract, breach of the implied covenant of good faith and fair dealing and promissory estoppel, and statutory violations under the New York General Business Law § 349 ("GBL § 349") on behalf of himself and a class of similarly situated homeowners.

For the past thirty-one years, Plaintiff, Gilberto Mendez, has resided at 45 Hackmatac Street in Central Islip, New York. Complaint ¶ 8. For several years prior to April 2009, Mr. Mendez's home mortgage was serviced by Countrywide. *Id.* ¶ 10. As of April 2009, Mr. Mendez had fallen three months behind on his monthly mortgage payments of $2,794.50, and requested and received a Countrywide Step Rate Loan Modification offer. *Id.* The offer provided a ten year interest only payment period which reduced Mr. Mendez's monthly mortgage payment to approximately $984.94, plus taxes and insurance, commencing in June 2009. *Id.* Mr. Mendez accepted the offer and returned the executed agreement to Countrywide in April 2009. *Id.* Shortly thereafter, Mr. Mendez called Countrywide to confirm the status of his loan modification. *Id.* ¶ 11. He was told that Countrywide was now operating as BAC, that certain income related documents in support of his loan modification either had not been received by BAC or were otherwise missing from his file, and that Mr. Mendez needed to provide the documents to BAC. *Id.* Mr. Mendez promptly provided all requested documents to BAC. *Id.*

In June 2009, Mr. Mendez began making his modified mortgage payments to BAC and continued to do so in July and August 2009. *Id.* ¶ 12 Rather than accept the modified payments and otherwise honor the terms of the Countrywide Step Rate Loan Modification agreement, BAC billed Mr. Mendez on his mortgage statement the full amount of $2,794.50 per month, plus late charges of approximately $42.68 per month and interest, for the months during which Mr. Mendez had made the modified payments. *Id.* In August 2009, Mr. Mendez contacted BAC concerning his Countrywide loan modification and was told to apply for a new loan modification agreement with BAC, which Mr. Mendez did. *Id.* ¶ 13 Over the next year and a half, Mr. Mendez applied for a loan modification with BAC on at least four separate occasions. *Id.* ¶ 14. Each time, BAC told Mr. Mendez that he needed to submit additional income related documents and/or that the documents he submitted were missing from his file and needed to be resubmitted. *Id.* Mr. Mendez has spent hours on the telephone with BAC and has faxed and sent by Federal Express numerous documents in response to BAC's repeated requests for additional, and often duplicative, documentation. *Id.* Despite Mr. Mendez's compliance, the terms of his Countrywide Step Rate Loan Modification agreement have not been honored by BAC and he has not received a new loan modification agreement. *Id.* Since the time that BAC refused to honor Mr. Mendez's Countrywide Step Rate Loan Modification agreement, BAC has charged Mr. Mendez late and penalty fees, interest and default service fees, including monthly inspection fees in amounts up to $195. *Id.* ¶ 25.

In his Complaint, Mr. Mendez has alleged that he and numerous other homeowners were offered and accepted a Countrywide Step Rate Loan Modification, but that Defendant BAC did not honor the terms of the Countrywide Step Rate Loan Modification agreement when it took over the mortgage servicing obligations of Countrywide. Complaint ¶¶ 1, 3, 4. Instead, Defendant BAC encouraged Plaintiff and other homeowners with a Countrywide Step Rate Loan Modification to apply for other home loan modifications with BAC and to provide numerous, and often duplicative, documents to allow BAC to verify their income. Complaint ¶ 3. Defendant BAC, however, failed to hire and properly train its staff or otherwise maintain a system to keep track of and timely analyze the income related documents submitted by Plaintiff and other homeowners in support of their loan modifications. *Id.* ¶¶ 4, 14-24. Thus, in addition to failing to honor the Countrywide Step Rate Loan Modifications, Defendant BAC wilfully and unreasonably delayed making any decision on subsequent loan modifications, thereby pushing Mr. Mendez and other homeowners further into debt. *Id.*

Defendant BAC has profited from its actions: by not honoring the Countrywide Step Rate Loan Modification agreements with Plaintiff and other homeowners, and by otherwise wilfully delaying any decision on subsequent loan modifications, BAC has been able to charge Plaintiff and the other defaulting homeowners unreasonable and excessive default related servicing fees, including monthly inspection fees, which are far greater than the actual cost to Defendant BAC of providing the default related services. *Id.* ¶¶ 4, 15.

II. **The FTC Action and the HAMP Contract Litigation Against Defendant BAC**

Within the past year, two federal courts have found that the acts alleged here against Defendant BAC sufficiently stated a claim for breach of contract and deceptive practices in violation of the consumer protection statutes.

On June 7, 2010, the Federal Trade Commission ("FTC") brought a civil enforcement action in the United States District Court, Central District of California, against Countrywide and BAC, formerly doing business as Countrywide, for charging borrowers who had fallen behind on their mortgage payments excessive and unlawful fees for "default related services," including the late payment fees and inspection fees which Mr. Mendez has been charged by Defendant BAC.

See *Federal Trade Commission, v. Countrywide Home Loans, Inc., and BAC Home Loans Servicing , LP*, 10-cv-4193 (RSWL) (SSx) (the "FTC Action"). The FTC alleged that BAC violated the mortgage contract by substantially marking up the cost of the default- related service fees well in excess of the actual cost of the services performed and that the services otherwise were not reasonable and appropriate to protect the note holder's interest in the property and rights under the security instrument. See Complaint ¶ 35 and Exhibit A thereto. The FTC alleged that "in the course and conduct of their loan servicing and collection, Defendants in numerous instances have represented, directly or indirectly, expressly or by implication, that consumers are obligated to pay the amounts specified in Defendants' communications for default-related services such as property inspections, title reports and foreclosure trustee services." *Id.* The FTC Action also alleged that homeowners in default, like Mr. Mendez, had no meaningful bargaining power: they had no choice as to what default-related services were performed, the cost thereof, or who performed the services. Complaint ¶ 34. The FTC Complaint alleged that Defendant BAC's actions violated Section 5(a) of the FTC Act, 15 U.S.C. § 45 (a), which prohibits "unfair or deceptive acts or practices affecting commerce." Complaint ¶ 36.

On June 15, 2010, the United States District Court for the Central District of California entered a Consent Judgment and Order (the "Consent Judgment and Order") which found that the FTC Action sufficiently stated a claim for deceptive, consumer oriented practices in violation of Section 5(a) of the FTC Act and breach of the mortgage contract and ordered that BAC immediately cease and desist its charging of homeowners the marked-up and unnecessary default-related fees. Complaint ¶¶ 37-40 and Exhibit B thereto. In addition, the Consent Judgment and Order required that any default-related fees charged by BAC could not exceed market rates, and that Defendant BAC was required to publish the market rates for default related fees, including inspection fees, on its website. Complaint ¶¶ 38-40. However, as alleged in Plaintiff's Complaint, Defendant BAC has continued to charge Mr. Mendez and other homeowners excessive and unlawful default-related fees. Complaint ¶¶ 43- 45.

On July 6, 2011, the United States District Court for the District of Massachusetts denied Defendant BAC's motion to dismiss claims for breach of contract, violation of the covenant of good faith and fair dealing, promissory estoppel and violation of several state consumer protection statutes, including GBL § 349, based on the plaintiffs' allegations, *inter alia*, that BAC had failed to honor another type of loan modification, *i.e.*, its promise to provide a permanent loan modification pursuant to the Home Affordable Modification Program to homeowners participating in the Trial Period Plan ("TPP"), failed to train and hire competent staff to review income-related documents submitted by homeowners in support of their loan modifications, and made false and misleading statements about the loan modification program to consumers. *See In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, 2011 U.S. Dist. LEXIS 72079, at * 17 (D. Mass. July 6, 2011).

III. ARGUMENT

A. The Complaint States A Claim For Defendant BAC's Breach of the Countrywide Step Rate Loan Modification Agreement

Plaintiff Mendez has alleged that Defendant BAC has breached his, and numerous other homeowners', Countrywide Step Rate Loan Modification agreement by failing to honor the terms of the agreement and the modified mortgage payments specified thereunder.

To state a claim for breach of contract in New York, the plaintiff must allege: "(1) the existence of a contract; (2) performance by the party seeking recovery; (3) non-performance by the other party; and (4) damages attributable to the breach." *Wharton v. Duke Realty, LLP*, 467 F.Supp. 2d 381, 393 (S.D.N.Y. 2006). Mr. Mendez has alleged each element in the Complaint: (1) Mr. Mendez was offered and accepted the Countrywide Step Rate Loan Modification agreement, Complaint ¶¶ 2, 10, 22, 55; (2) Mr. Mendez fully performed his part pursuant to the Countrywide Loan Modification agreement by timely providing Defendant BAC with all requested documents concerning his income and making three timely modified monthly mortgage payments pursuant to the Countrywide Step Rate Loan Modification agreement in June, July and August 2009, *Id.* ¶¶ 11, 12, 14, 24, 57, 58; (3) Defendant BAC has breached the Countrywide Loan Modification agreement by failing to honor Mr. Mendez's modified payments, *Id.* ¶ 12, 56, 59-60; and (4) Mr. Mendez has suffered damages, including late and penalty charges and interest as a result of Defendant BAC's failure to honor the Countrywide Loan Modification agreement. *Id.* ¶¶ 12, 60, 61.

Defendant BAC argues that there is no claim for breach of contract because Mr. Mendez has not alleged the formation of a contract with respect to the Countrywide Step Rate Loan Modification. *See* Defendant's Memorandum In Support of Motion To Dismiss ("Def.'s Mem.") at 8. Yet Mr. Mendez plainly alleges in the Complaint the formation of a valid Countrywide loan modification agreement and his performance thereunder. Complaint ¶¶ 2, 10-12, 14, 22, 24, 55-61. Indeed, as Mr. Mendez explained in a letter to Defendant BAC prior to commencing this action, " In April 2009 . . . I asked Countrywide for help. I submitted the ap[p]lication for the mortgage modification and I was accept[ed] and granted the modification for 10 years. . . I was following the terms of the mortgage modification contract that was accept[ed] and granted by Countrywide." *Id.* ¶ 22.

Defendant argues that Mr. Mendez did not allege satisfaction of a condition precedent to contract formation, namely, the timely submission of income related documents in support of his loan modification. Contrary to Defendant's argument, the Complaint alleges that Mr. Mendez timely provided all requested income related documents in support of his Countrywide Step Rate Loan Modification in the first instance, "Mr. Mendez provided the requested documents promptly to BAC," (Complaint ¶11), and that "Mr. Mendez has timely provided BAC with all requested documentation, including utility bills, bank statements, income statements and tax filings, and has submitted the requested documentation multiple times to BAC." Complaint ¶ 24. The Complaint, moreover, provides numerous and detailed allegations showing that at the requests of BAC, Plaintiff continued to provide income related documentation in support of a loan modification from April 2009 to October 2010. *Id.* ¶¶ 13-21.

In the similar class action brought against Defendant BAC for failure to provide a permanent loan modification to homeowners participating in the TPP, *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig*., 2011 U.S. Dist. LEXIS 72079, at * 17 (D. Mass. July 6, 2011) (the "*HAMP Contract Litigation*"), the Court denied Defendant BAC's motion to dismiss the breach of contract claim. Just as Defendant BAC argues here, it argued in the *HAMP Contract Litigation* that the plaintiffs failed to meet conditions precedent to contract formation by not providing all the requested documents in support of their loan modification. The court in the *HAMP Contract Litigation* rejected BAC's argument, holding as follows:

> Defendants assert plaintiffs' lack of full compliance and consequent inability to enforce the contract. Plaintiffs dispute defendants' assertions, but more important for purposes of the motion to dismiss, the complaint meticulously details each plaintiff's initial and ongoing compliance with all conditions. That is sufficient to defeat the motion on this ground.

In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig., 2011 U.S. Dist. LEXIS 72079, at * 17 (D. Mass. July 6, 2011).

Here too, the Complaint details Plaintiff's initial and ongoing compliance with all conditions and his providing of all requested income related documents to BAC in support of his Countrywide Step Rate Loan Modification. As in the *HAMP Contract Litigation*, Plaintiff's allegations are sufficient to defeat Defendant BAC's motion to dismiss the breach of contract claim.

B. The Complaint States A Claim For Breach Of the Implied Covenant Of Good Faith And Fair Dealing

Plaintiff has alleged Defendant BAC's breach of the implied covenant of good faith and fair dealing. "Implicit in all contracts is a promise of good faith and fair dealing, which is breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *AJW Partners, LLC, v. Cyberlux Corp.*, 2008 NY Slip Op 52020U, at * 5, 873 N.Y.S.2d 231 (Sup. Ct., N.Y. County 2008). In addition, "[e]ncompassed within the implied obligation of each promisor to exercise good faith are 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'" *Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 390 (New York Court of Appeals 1995) (internal citations omitted). This includes "a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Id.* (internal citations omitted). Examples of breach of the implied covenant of good faith and fair dealing as set forth in the Restatement of Contracts include:

> [E]vasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance.

Restatement (Second) of Contracts, note 7, at § 205 Comment (d) (1981).

The Countrywide Step Rate Loan Modification stated "this modification will not take effect if we are not able to verify your income" (Hail Decl., Exh. 1 at 3) and instructed Mr. Mendez to provide documents concerning his income (*id.* at 2), which he did. Complaint ¶¶ 11, 13-21, 24. Although not expressly stated in the agreement itself, the implied covenant of good faith and fair dealing implicit in the Countrywide Step Rate Loan Modification agreement imposes on Defendant BAC, as the successor of Countrywide's mortgage servicing duties, a duty to safeguard, maintain and timely consider the documents provided by Mr. Mendez and to hire and train competent staff to keep track of the documents and verify income. Defendant BAC breached the implied covenant of good faith and fair dealing by repeatedly losing, misplacing, or otherwise failing to consider Mr. Mendez's income related documents in support of his loan modification in order to verify his income in a timely manner. *Id.* ¶¶11, 13-21, 65. In addition, the Complaint alleges that "BAC failed to staff its Home Retention Department with knowledgeable, competent and consistent representatives. Each time Mr. Mendez called the BAC Home Retention Department, he spoke with a different representative concerning his mortgage and loan modification, none of whom could provide Mr. Mendez with clear answers." *Id.* ¶ 17. Moreover, the Complaint alleges that Defendant BAC abused and wilfully delayed the document review and income verification process in order to profit from the default service related fees which it charged Plaintiff and other home owners during this process. *Id.* ¶¶ 24, 25, 65. Indeed, Mr. Mendez was subjected to over a year and a half of repeated requests from Defendant BAC for documents to verify his income during which time Defendant BAC continued to charge him ever increasing late fees, penalties and interest on his home mortgage. *Id.*, ¶¶ 14, 24, 25, 65. The allegations in the Complaint show that Defendant BAC acted with a "lack of diligence and slacking off, willful rendering of imperfect performance, . . . and interference with or failure to cooperate in the other party's performance." See Restatement, *supra.*, note 7, at § 205 Comment (d) (providing examples of bad faith acts).

In the *HAMP Contract Litigation*, which concerns Defendant BAC's failure to provide a permanent loan modification to homeowners participating in the TPP, the court denied the motion to dismiss the implied covenant of good faith and fair dealing claim where the complaint alleged that the defendants "willfully failed to modify qualifying loans, declined to properly train and supervise its agents, encouraged and/or allowed employees to make inaccurate representations, all 'in bad faith and for its own economic benefit.' . . . These allegations are sufficient to state a claim." *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, 2011 U.S. Dist. LEXIS 72079, at * 17 (D. Mass. July 6, 2011). *See also*, *Dalton*, 87 N.Y. 2d 384, 390-91 (defendant breached the covenant of good faith and fair dealing by failing to make a good faith effort to consider documents submitted by the plaintiff; "Dalton triggered this implied-in-law obligation on the part of ETS by exercising his contractual option to provide ETS with information. . . whether [defendant] made any effort to consider this relevant information submitted by Dalton. . . is a factual inquiry.").

Defendant BAC argues that Plaintiff's claim for breach of the implied covenant of good faith and fair dealing must fail because no loan modification contract was ever formed. As set forth above in Section III (A), however, the Countrywide Step Rate Loan Modification agreement was formed and Plaintiff satisfied all conditions precedent to Defendant BAC's performance thereunder.

Alternatively, Defendant BAC argues that Plaintiff's claims for breach of contract based on the Countrywide Step Rate Loan Modification agreement and breach of the implied covenant of good faith and fair dealing are identical, and that the later should be dismissed as duplicative. But there are two separate claims: Defendant breached the Countrywide Step Rate Loan Modification agreement by failing to honor its terms and failing to accept the modified mortgage payments made by Mr. Mendez in June, July and August 2010. Complaint ¶¶ 55-66. Defendant breached the covenant of good faith and fair dealing by repeatedly losing, misplacing or otherwise not considering Plaintiff's income related documents in support of his loan modification in the first instance, and for the next year and a half following Mr. Mendez's acceptance of the Countrywide Step Rate Loan Modification agreement, and by failing to hire and train competent staff to maintain and timely evaluate Plaintiff's documents and failing to make a good faith and timely effort to verify his income. *Id.* ¶¶ 63-66.

Defendant BAC argues that Plaintiff's claim must fail because "Plaintiff does not complain that BAC improperly exercised discretion in following the terms of a contract as required for a good faith and fair dealing claim." Def.'s Mem. at 13. Yet Plaintiff has alleged precisely this and more. Complaint, ¶¶ 11, 13-21, 24, 25, 63-66. Defendant's motion to dismiss Plaintiff's claim for breach of the covenant of good faith and fair dealing must be denied.

C. **The Complaint Adequately Alleges A Claim For Promissory Estoppel**

Defendant BAC moves to dismiss Mr. Mendez's claim for promissory estoppel on the ground that he could not have reasonably relied on a promise in the Countrywide Step Rate Loan Modification to modify his loan because the Countrywide offer contained conditions precedent (*i.e.*, the providing of documents reflecting income), which Plaintiff did not satisfy. This argument fails because Plaintiff has alleged that he complied with all conditions precedent by timely submitting the requested documents to Defendant BAC and making three modified payments pursuant to the Countrywide Step Rate Loan Modification agreement. *See* Section III(A) herein. Defendant BAC made this same argument to dismiss the promissory estoppel claim brought against it in the *HAMP Contract Litigation*, which the Court denied. *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, 2011 U.S. Dist. LEXIS 72079, at *16 (D. Mass. July 6, 2011) ("Defendants move to dismiss this claim on the ground that no plaintiff could reasonably have relied on a promise in the TPP to modify his or her loan because the TPP contained numerous conditions precedent which plaintiffs failed to fulfill. As I noted above, this argument fails because plaintiffs allege that they have complied with conditions precedent. The motion to dismiss the promissory estoppel claim is therefore denied.").

Defendant also agues that Plaintiff's claim for promissory estoppel must be dismissed for lack of injury because "Plaintiff's history of noncompliance with his loan terms indicates that he would have incurred these additional fees regardless of whether he relied on any modification plan." Def.'s Mem. at 15. Defendant's argument is not only inaccurate, but also highly speculative and presents issues of fact not properly decided on a motion to dismiss. In accordance with the Countrywide Step Rate Loan Modification agreement, Mr. Mendez made modified mortgage payments in June, July and August 2009. Complaint ¶ 12. Because these modified payments ultimately were rejected by BAC, Mr. Mendez incurred additional late and penalty fees as a result. *Id.* Had he not relied on the Countrywide Step Rate Loan Modification agreement, Mr. Mendez could have sought or considered other financial alternatives in April 2009; he certainly would not have made the three modified payments in June, July and August 2009, and would not have incurred the late and penalty fees as a result of BAC's rejection of these modified payments.

The cases on which Defendant BAC relies are inapposite. See *Schwartz v Miltz*, 77 A.d.3d 723, 724-25 (2d Dept. 2010)(evidence presented at trial did not support elements of reasonable reliance and injury for promissory estoppel claim); *Braddock v. Braddock,* 2009 NY Slip Op 39, 3, 60 AD 3d 84 (1st Dept. 2009)(the appellate court modified the trial court's order granting the motion to dismiss, reinstated plaintiff's claims for fraud, promissory estoppel and breach of fiduciary duty, and held, *inter alia*, "justifiable reliance, it is not amenable to determination as a matter of law on this record and in this context").

D. The Complaint States A Claim For Breach Of The Original Mortgage Contract

Plaintiff has alleged that Defendant BAC breached the terms of the original mortgage contract or deed of trust by charging marked-up and unnecessary default related service fees to the detriment of Plaintiff and to the profit of Defendant BAC.

As alleged in the Complaint, the mortgage contract between a lender and borrower/homeowner consists of two primary documents: (1) the promissory note ("Note"), and (2) the mortgage or deed of trust ("Security Instrument"). Complaint ¶ 73. Mortgage contracts serviced by Defendant BAC are substantially similar to the standard Fannie Mae/Freddie Mack form contract and contain form language concerning what happens when a borrower defaults on the loan. *Id.* The Security Instrument authorizes the mortgage servicer, here Defendant BAC, to pay for "whatever is reasonable and appropriate to protect the note holder's interest in the property and rights under the security instrument, including protecting and/or assessing the value of the property, and securing an/or repairing the property." *Id.* The Security Instrument also provides that any amounts "disbursed by" the servicer shall become additional debt of the borrower secured by the Security Instrument. *Id.* ¶ 74. With respect to the payment of fees in the event of default, the Note provides that the note holder "will have the right to be paid back by me for all costs and expenses in enforcing this note to the extent not prohibited by applicable law." *Id.* The mortgage contract thus allows the servicer to pay for default- related services when necessary and appropriate and to be reimbursed by the borrower. *Id.* ¶ 75. However, the mortgage contract does not authorize the servicer to mark-up the actual costs of the default related services in order to make a profit at the borrower's expense. *Id.* Defendant BAC has breached the mortgage contract by charging Plaintiff and other borrowers default service fees, including inspection fees, which have been marked-up to prices well in excess of the actual cost of the services performed and by charging for services, including monthly property inspections, that are not reasonable or appropriate to protect the note holder's interest in the property and rights under the security instrument. *Id.* ¶ 76. As a direct and proximate result of BAC's breach of the mortgage contract, Plaintiff and other similarly situated homeowners have suffered damages by incurring excessive, unnecessary and unreasonable default related service fees. *Id.* ¶ 77.

Defendant agues that the default service fee breach of contract claim does not satisfy *Twombly* pleading requirements because there is no allegation in the Complaint as to what constitutes a "reasonable and appropriate" fee under the contract. The Complaint, however, does allege this information: in accordance with the Consent Judgment and Order in FTC Action, the rates published on Defendant BAC's website are supposed to reflect the reasonable market rates for default related fees. Complaint ¶¶ 38-40. Accordingly, while Defendant BAC may charge inspection fees from $14 to $26.35, it instead charged Mr. Mendez and other defaulting homeowners monthly inspection fees ranging from $75 to $195. *Id.* ¶¶ 44, 45.

Defendant also argues that Plaintiff's breach of contract claim based on the charging of the marked-up default service fees fails to satisfy the pleading requirements of *Twombly* because Plaintiff does not allege that the services listed on the BAC website were the same services that Plaintiff was charged for. Contrary to Defendant's argument, the Complaint does, in fact, allege precisely this. Complaint ¶¶ 44, 45.

Defendant BAC argues that there are no allegations in the Complaint as to how BAC allegedly marked-up the default service fees in a way that impacted Plaintiff, but the Complaint plainly alleges that Defendant BAC profited by charging Plaintiff, and numerous other similarly situated consumers, default related fees, including inspection fees, which were marked-up over reasonable market rates and charged on a monthly basis, which was far more often than necessary to protect the note holder's interest in the property. Complaint ¶¶ 33, 76. As a result, Plaintiff has incurred and paid excessive and unreasonable default related service fees, including monthly inspection fees in amounts of $75 to $195, on his mortgage. *Id.* ¶24 ("For the past several months, Mr. Mendez has been making complete mortgage payments to BAC. . . plus late fees, interest and other default-related servicing fees which BAC has charged Mr. Mendez since the time it took over the servicing of his home mortgage from Countrywide and failed to honor the Countrywide loan modification agreement."), ¶¶ 44, 45, 77.

Defendant argues that "Plaintiff has not identified how the allegedly charged fees were in breach of the contract, only that they may not have corresponded to the fee range listed on a website." Def.'s Mem. at 17. This argument too must fail, as the Complaint alleges that the mortgage contract and deed do not allow Defendant BAC to make a profit from the borrower by charging unreasonable or unnecessary default related service fees. Complaint ¶ 75. Rather, the mortgage contract and deed only allow Defendant BAC to be reimbursed for its reasonable and necessary default related expenses. *Id.*

E. **Plaintiff Has Alleged Violation Of GBL § 349**

Mr. Mendez has alleged that in violation of GBL § 349, Defendant BAC has engaged in the materially deceptive practice of charging him and other homeowners default service fees, including monthly inspection fees, in amounts that BAC is not entitled to collect. As alleged in the Complaint, Defendant BAC has charged Mr. Mendez and other consumers "excessive, unreasonable and/or unlawful default related servicing fees, including inspection fees, . . .well in excess of the amounts BAC represents on its website that it may charge for inspections", and that the default service fees are in violation of both the mortgage contract and the Consent Judgment and Order in the FTC Action. Complaint ¶¶ 79, 81. Mr. Mendez has sufficiently stated a claim for violation of GBL § 349.

1. **The FTC Action Found That Defendant BAC's Charging of Marked-Up And Excessive Default Fees States A Claim for Unfair And Deceptive Acts Affecting Consumers**

Defendant argues that Plaintiff's claim for violation of GBL § 349 must be dismissed for failure to allege a materially deceptive or misleading practice affecting consumers. Def.'s Mem. at17. Defendant is wrong. The legislative purpose in enacting GBL § 349, which precludes deceptive acts or practices that mislead a consumer in a material way, was to follow the FTC with respect to the interpretation of deceptive acts and practices outlawed by Section 5 of the Federal Trade Commission Act. *See State by Lefkowitz v Colorado State Christian College of Church of Inner Power, Inc.* 76 Misc 2d 50, 54, 346 NYS2d 482 (N.Y. Supreme Court, N.Y. County 1973). As set forth in the Complaint, and in Section II herein, BAC's charging of excessive default related servicing fees has already been found to be in violation of Section 5 of the FTC Act which prohibits "unfair or deceptive acts or practices affecting commerce." Complaint ¶ 36, Consent Judgment and Order, ¶ 6, attached as Exhibit B to the Complaint.

Plaintiff has alleged in his Complaint that in violation of the Consent Judgment and Order, Defendant "BAC has continued to make false representations about the amounts owed by homeowners, to charge fees for default-related services that were not authorized by the loan agreements, and to charge excessive and unreasonable 'marked-up' fees for the default-related services." Complaint ¶ 43. As alleged in Plaintiff's Complaint, while Defendant BAC states on its website that "it charges between $14 and $26.35 for the inspection of property" homeowners, like Mr. Mendez, "who are in default are being charged inspection fees in excess of those represented by BAC on its website." Complaint ¶ 44. Indeed, Defendant BAC has charged Mr. Mendez monthly inspection fees in excessive amounts ranging from $75 to $195. Complaint ¶ 45. Because the acts of Defendant BAC which form the basis of Plaintiff's GBL § 349 claim have already been found to state a claim under Section 5 of the FTC Act, and otherwise are unlawful and in violation of mortgage contract and the Consent Judgment and Order, Plaintiff has alleged that BAC has engaged in materially deceptive acts in violation of GBL § 349.

2. New York Courts Routinely Find That Acts Which Violate Another Law State A Claim For Deceptive Practices Under GBL § 349

Courts in New York routinely find that allegations of a mortgage bank charging consumers fees which the mortgage bank is not entitled to collect, and impliedly representing that the fee is legitimate and that consumer is obligated to pay it, states a claim for deceptive practices under GBL § 349. *See Cohen v. J.P. Morgan Chase & Co.*, 608 F. Supp. 2d 330, 350 (E.D.N.Y. 2009) (Court denied defendant's motion for summary judgment on plaintiff's claim for violation of RESPA and GBL § 349 based on allegations that the mortgage bank charged plaintiff a fee for nonexistent services on her closing statement; the Court held: "Given a consumer's reasonable assumption that all fees charged by a respectable bank are legal, collecting fees in violation of state and federal laws may satisfy the 'misleading' element of § 349.")(citing cases therein); *Moses v. Citicorp Mortg.*, 982 F. Supp. 897, 902 (E.D.N.Y. 1997) (court denied defendant's motion to dismiss GBL §349 claim where plaintiffs alleged they were charged points and interest rates on their mortgage which were higher than the actual rates they were approved for and which also violated RESPA); *Negrin v. Norwest Mortgage, Inc.*, 263 A.D.2d 39, 700 N.Y.S.2d 184 (2d Dept 1999) (court denied motion to dismiss plaintiffs' GBL § 349 claim which alleged mortgage company charged consumers "unlawful fax fees and recording fees"; court held that "[a]llegations of a bank's unilateral imposition of illegal and/or unwarranted fees upon its customers states a valid claim of consumer fraud."); *Kidd v. Delta Funding Corp.*, 2000 N.Y. Misc. LEXIS 29 (Sup. Ct., N.Y. County, Feb. 22, 2000) (plaintiffs alleged that defendant violated GBL § 349 by charging its customers an unlawful mortgage "processing" fee in violation of state regulations. The court held that despite defendant's disclosure of the "processing" fee, defendant's "conduct in imposing and collecting the illegal fees, and impliedly representing that it was entitled to such fees, constitutes deceptive conduct within the scope of GBL § 349."); *Walts v. First Union Mortgage Corp.*, 259 A.D.2d 322, 686 N.Y.S.2d 428, 430 (1st Dept 1999) (plaintiffs stated a claim for violation of GBL§ 349 by alleging that the defendant mortgage companies had billed consumers for premiums which defendants were not legally entitled to collect under the insurance regulations. That defendants disclosed in their billing statements the fact that they were charging plaintiffs these premiums did not change the deceptive nature of defendants' conduct.); *Dowd v. Alliance Mtge. Co.*, 32 A.D.3d 894, 895, 822 N.Y.S.2d 558 (2d Dept. 2006) (reaffirming *Negrin*).

Here, Plaintiff has alleged that the inspection fees charged by BAC violate the mortgage contract and the Consent Judgment and Order in both amount and frequency. There is no question that a practice may be unlawful and actionable under the consumer protection statues "if it violates any law 'civil or criminal, statutory or judicially made, federal, state or local.'" *Ferrington v. McAfee, Inc.*, 2010 U.S. Dist. LEXIS 106600. at *39 (N.D. Cal. Oct. 5, 2010). This is true even where the underlying statute, regulation or judicially made law does not afford a private right of action. *See e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1090-95 (Cal. 1998); *Optivus Tech., Inv. v. Ion Beam Applications, S.A.*, 469 F.3d 978, 986 (Fed. Cir. 2006)(state consumer protection claim based on violation of FDA regulation for which there was no private right of action).

Defendant BAC argues that Plaintiff's claim for violation of GBL § 349 must fail because he has not alleged that he ever saw or relied on the fees for the default related services published on Defendant BAC's website and that therefore, he could not have been deceived by Defendant BAC charging him fees that were much higher than those published on its website. Def.'s Mem. at 18. But Plaintiff is not claiming that the fees published on Defendant BAC's website in accordance with the Consent Judgment and Order are deceptive. Rather, Plaintiff alleges that the much higher default service fees that Defendant BAC charged him and other consumers were deceptive and materially misleading. Complaint ¶¶ 80, 81.

Plaintiff's claim for violation of GBL § 349 should be upheld in its entirety.

IV. CONCLUSION

For the reasons set forth herein, Defendant BAC's motion to dismiss the complaint should be denied in its entirety. If the Court grants any portion of Defendant's motion, then Plaintiff respectfully requests leave to re-plead those claims.

DATED: August 1, 2011
New York, New York

By: [signature]

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